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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

LINDSAY DYAN HIMMELSPACH,

Defendant and Appellant.

C084970

(Super. Ct. No. CM043871)

After defendant Lindsay Dyan Himmelspach pled guilty to two counts of unlawful sexual intercourse (Penal Code,¹ § 261.5, subdivision (c)), the trial court suspended imposition of sentence and placed her on three years' formal probation. The court did not decide at the change of plea hearing or the sentencing hearing where it granted probation, whether to order sex offender registration pursuant to section 290.

¹ Further undesignated statutory references are to the Penal Code.

Subsequently, defendant violated probation. The trial court reinstated probation, but simultaneously imposed a section 290 registration requirement. Defendant appeals from the order reinstating probation with modifications.

Defendant contends the trial court's registration order must be stricken on numerous grounds. We conclude the order is invalid for a reason not raised by defendant but conceded by the People: it was unauthorized as a matter of law because section 290 does not permit a registration order to be made when a trial court is reinstating probation.

We shall strike the registration condition and otherwise affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant, a high school teacher, admitted under an open plea agreement that she violated section 261.5, subdivision (c) by engaging in sexual intercourse with two minor students. Section 261.5, subdivision (c) is not mentioned in section 290, subdivision (c), which enumerates the offenses that mandate sex offender registration. However, section 290.006, subdivision (a) provides: "Any person ordered by any court to register pursuant to the Act for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration."

On April 20, 2016, when the trial court took defendant's plea, the court did not order registration pursuant to section 290 or make any finding under section 290.006, subdivision (a).

At the sentencing hearing on June 15, 2016, the trial court followed the probation report's recommendation to suspend imposition of sentence and grant three years' formal probation with 120 days in custody. The court deferred ruling on whether to order defendant to register pursuant to section 290, asking the parties to brief the issue and

setting a hearing date of August 3, 2016. The court did not make any finding under section 290.006, subdivision (a) at this hearing.

On August 3, 2016, the prosecutor argued for a section 290 order. Defense counsel, joined by the probation department, opposed it. The court ruled:

“Counsel, as well as the Court, oftentimes we misuse the term ‘ “sentencing.” ’ It’s a distinction with a difference. *The defendant has not yet been sentenced. Instead the imposition of sentence was suspended, and she was placed on probation, ordered to serve 120 days in jail and she’s to start that this Friday.*

“*If there’s a violation of probation and defendant is sent to prison, then at that time she would be, quote, ‘sentenced.’*

“Based on my review of all the cases cited by both counsel, the Court is not ordering registration at this time; however, I want to be clear: *If there is a violation of probation resulting in a prison sentence, I will at that time, in fact, order lifetime registration and because of that, the defendant needs to be aware that it will be a state prison sentence, not a county.*

“*Hopefully, the very real possibility of sex offender registration, as well as state prison as opposed to county[,]* will be sufficient motivation to ensure that defendant complies with the terms of probation; so registration is not ordered at this time.” (Italics added.)

On March 30, 2017, the probation department filed a petition to violate defendant’s probation, alleging she had committed theft and unlawfully possessed a controlled substance, and had failed to report her law enforcement contact to the probation officer.

On April 12, 2017, defendant admitted the violation.

A supplemental probation report recommended reinstating probation, but suggested the terms of probation be “modified” to include a registration requirement under section 290.

At the sentencing hearing on June 7, 2017, the trial court stated its intent to follow the probation report's recommendation, including the section 290 order.

Defense counsel objected to a registration order at this time, arguing that it would improperly punish defendant for violating probation, which is not the purpose of a registration order, and that nothing had occurred that would make her an appropriate candidate for registration -- "[n]o texts, no Facebook contacts, no hanging out with young people, no behavior of any sort that would indicate that she is a threat to the public or would warrant any kind of treatment." Counsel did not cite any statutory bar to making a section 290 order at this hearing.

The prosecutor replied that the trial court advised defendant when granting probation that she could be required to register for life if she violated probation. It was obvious that defendant committed her offenses for the purpose of sexual gratification, as the court would have to find to impose a registration requirement. The violation of probation she had committed -- taking advantage of a position of trust by being admitted into someone's home and then stealing medication from that person -- indicated that she would be a proper candidate for revoking probation and imposing a prison sentence.

The trial court ruled: "In my mind [the probation report] was a very generous recommendation for reinstatement but because of my respect for [the probation officer] I'm going to follow that recommendation but it's also partly because of her position that I do think it is appropriate to at this time to order the registration under 290. [¶] I think based on the current violations there's serious credibility issues that [defendant] presents and I think given the violation and those issues, I think, for public safety purposes 290 is appropriate." The court also found "to the extent necessary as it relates to the 290" that defendant's offenses under section 261.5, subdivision (c) "were performed for purposes of sexual gratification."

DISCUSSION

Defendant attacks the registration order on a variety of grounds, including that “the trial court did not find that [defendant] was likely to reoffend by committing a sex offense; there was no evidence to show that [defendant] was likely to reoffend in this manner; the reasons for requiring registration were not sufficient to justify its imposition; and sex offender registration was imposed improperly, as a punishment for [defendant]’s probation violation.” Defendant also contends that the order “violated her Sixth Amendment right to have any facts that increase her punishment, beyond the prescribed statutory maximum, decided by a jury beyond a reasonable doubt because the sex offender registration requirement was imposed as a punishment for [defendant]’s probation violation.”

We need not address these contentions because there is a more fundamental objection to the registration order, which the People properly point out: the trial court could not lawfully make that order at a hearing reinstating defendant’s probation. A discretionary registration order under section 290.006, subdivision (a) may issue only if the court makes the required findings and states the required reasons for the order “*at the time of conviction or sentencing.*” (§ 290.006, subd. (a), italics added; *People v. Allexy* (2012) 204 Cal.App.4th 1358, 1363.) The court did not make any registration order or offer any findings and reasons to support such an order when defendant entered her plea (“the time of conviction”), and “the time of . . . sentencing” had not arrived because the court did not impose sentence at the violation of probation hearing. Therefore, the order is unauthorized and we must strike it.

The People contend this court can salvage the order by deeming it made only for the term of defendant’s probation. We decline to do so. If a distinction is to be drawn between lifetime registration and registration for the duration of probation (*People v. King* (2007) 151 Cal.App.4th 1304, 1308-1309), this decision must be made by the trial court in the first instance.

Because the registration condition was not ordered at an appropriate time, it was unauthorized, and we must strike it. We therefore do not address the parties' arguments as to the merits of the trial court's findings and reasons for the order.

DISPOSITION

The section 290 registration condition is stricken. The order is otherwise affirmed.

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Duarte, J.